

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 952 of 2001****For Approval and Signature:****HONOURABLE MR.JUSTICE A.M.KAPADIA****HONOURABLE MR.JUSTICE K.A.PUJ**

=====

1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not
?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

=====

ASARI RAMESH RUPABHAI - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

=====

Appearance :

MR MJ BUDDHBHATTI for Appellant(s) : 1,

MR. R.C.KODEKAR, APP for Respondent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA**and**

HONOURABLE MR.JUSTICE K.A.PUJ**Date : 05/09/2006****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)**

1. A six-year-old child was subjected to sexual abuse by the Appellant - Ansari Ramesh Rupabhai ("the accused" for short). The accused was, therefore, charged and tried by the learned Additional Sessions Judge, Jamnagar, in Sessions Case No. 111 of 1998 for commission of the offence punishable under Section 376(2)(f) of the Indian Penal Code ("the IPC" for short).
2. At the end of the trial, the accused was found guilty of the offence with which he was charged, and resultantly, convicted vide judgment and order dated 30.10.2001 and sentenced to undergo 10 years' RI with fine of Rs.1000/-, in default of payment of fine, SI for a period of 2 months, which has given rise to the instant Appeal filed under Section 374 of the Code of Criminal Procedure ("the Code" for short) at the instance of the accused.
3. Briefly stated the prosecution case is that in respect of an incident dated 20.8.1998, a complaint was lodged by Kanchanben Bharatbhai Pankhania on the date of the alleged incident at about 10:30 pm with 'B' Division Police Station,

Jamnagar, stating therein that; at about 10:30 pm when she was preparing to retire to her bed, and her six-year-old daughter Preeti was playing near *Dely*, soon thereafter, her daughter started weeping. Upon asking her, she told her mother that the accused, who is identified as the custom-vala, allured her for a chocolate and taken her to his house. The accused caused her to lie on the cot, and after gagging her mouth, the accused started pushing his penis forcefully, over her vaginal part, because of which she suffered great pain in her vaginal part and on account of this, she started weeping. She also told her mother that the accused persuaded her not to tell the incident to her mother otherwise she would be killed. Thereafter the accused dragged her out of his house. The complainant observed that the blood was coming out from the vaginal part of her daughter, and therefore, the complainant told about the said incident to her neighbours - Vanrajbhai and Bintibhai. Thereupon, her daughter was taken to Government dispensary, wherein, after providing preliminary treatment, she was referred to Irvin Hospital, Jamnagar for further treatment.

2.1 The complaint for the aforesaid incident was lodged by the complainant at 'B' Division Police Station, Jamnagar, which came to be registered vide CR No. I 169/1998 against the accused for

commission of the offence punishable under Section 376(2)(f) of the IPC.

2.2 Pursuant to the registration of the FIR, investigation was put into motion. During the course of investigation, the statement of the witnesses was recorded, injury certificate of the victim was obtained, panchnama of the scene of offence was prepared, clothes of the accused as well as the victim were also recovered by drawing a panchnama, which were sent to FSL for chemical analysis. After obtaining the FSL report, and the certificate issued by the Doctor and also obtaining birth certificate of the victim, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Chief Judicial Magistrate, Jamnagar.

2.3 As the offence under Section 376(2)(f) of the IPC was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Jamnagar committed the case to the Sessions Court, Jamnagar. The learned Additional Sessions Judge, Jamnagar, to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 376(2)(f) of the IPC.

2.4 The charge was read over and explained to the accused. As the accused pleaded not guilty to the charge, he was put to trial and tried by

the learned Additional Sessions Judge, Jamnagar in Sessions Case No. 111 of 1998.

2.5 To prove the culpability of the accused, the prosecution has, in all, examined as many as 20 witnesses, details of which, given in paragraph 5 of the impugned judgment and order are as under:

Witness	Exhibit	Name	Status	Page No.
PW-1	7	Dr. Shobhanaben Vallabhbhai Bosania	Medical Officer	45
PW-2	10	Dr. Vinaykant Premjibhai Chavda	Medical Officer	67
PW-3	19	Kanchanben , Wife of Bharatbhai Pankhania	Complainant	95
PW-4	21	Preeti Bharatbhai Pankhania	Prosecutrix	111
PW-5	22	Ashokbhai Gokanbhai Mackwana	Independent witness	123
PW-6	23	Vanrajsinh Anadubha Gohil	Independent witness	131
PW-7	25	Paratapray Rugnath Dattani	Panch witness	143
PW-8	27	Vinod Bachubhai	Panch witness	153
PW-9	29	Keshavji Trikdas	Panch witness	159
PW-11	37	Dharmesh Bhanushanka Boda	Panch witness	183
PW-12	38	Balubhai Bharivsinh	Police witness	189

Witness	Exhibit	Name	Status	Page No.
PW-13	39	Natwarlal Chakubhai Raval	ASI	193
PW-14	42	Dilipsinh Bhimsinh Jadeja	Police Constable	203
PW-15	45	Majojkumar Varma	Custom Inspector	213
PW-16	48	Niruben Dhirajlal Agravat	Head Master of Saraswati Vidyalaya	225
PW-18	51	Gandubhai Gokalbhai	PSI	233
PW-20	57	Kalabhai Maldevbhai Varu	PI	265

2.6 To prove the culpability of the accused, the prosecution has also produced as many as 35 documents and relied upon the contents of the same, details of which, enumerated in paragraph 6 of the impugned judgment and order are as under:

Srl.No.	Particulars	Exhibit
1.	Case papers of Preeti Bharat	8
2.	Case papers of Preeti Bharat	11
3.	Medical certificate of Preeti Bharat	12
4.	Yadi for medical check-up of the accused.	13
5.	Case papers of the accused.	14
6.	Medical certificate of the accused.	15

Srl.No.	Particulars	Exhibit
7.	Letter of taking sample of the accused.	16
8.	Panchnama of the scene of the offence.	26
9.	Panchnama of seizure of the underwear of the victim.	28
10.	Panchnama of the clothes worn by the accused at the time of incident.	30
11.	Panchnama of the position of the person of the accused.	35
12.	Report of registration of offence.	40
13.	Station Diary Entry.	41
14.	Note of M.L.C.	43
15.	Yadi sent to PSI on the basis of MLC entry.	44
16.	Muster roll of the Custom office, Khambhalia.	46
17.	Logbook of the Custom Office, Khambhalia.	47
18.	Birth certificate of Puja Bharatbhai Pankhania.	49
19.	Original complaint.	52
20.	Yadi sent to PS0 for registration of offence as per 0/89.	53
21.	Yadi made for taking sample of Saliva, blood of the victim.	58
22.	Yadi to the Principal for birth certificate of Preeti.	59
23.	Forwarding letter of sending mudamal to FSL.	60
24.	Certificate of authority.	61

Srl.No.	Particulars	Exhibit
25.	Acknowledgment of receipt of mudamal from FSL.	62
26.	Forwarding letter along with analysis report.	63
27.	Chemical analysis report.	64
28.	serological report.	65
29.	Yadi made for medical examination of the accused.	66
30.	Yadi made for collecting semen sample of the accused.	67
31.	Copy of application made to JMFC for collecting semen sample of the accused.	68
32.	Copy of application made to JMFC for collecting semen sample of the accused.	69
33.	Copy of application made to JMFC for collecting semen sample of the accused.	70
34.	Copy of yadi made to Irvin Hospital, Jamnagar for collecting semen sample of the accused.	71
35.	Copy of yadi made to Irvin Hospital, Jamnagar for collecting semen sample of the accused.	72

2.7 After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Jamnagar, explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as

required under Section 313 of the Code.

2.8 In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated on account of the previous enmity. He has also stated that he has given Rs.3000/- to the complainant. Thereafter, the complainant again demanded Rs.7000/- from him, which he refused to give. He has also stated that at the time of the alleged incident, there was no erection in his penis and he was in the impotent position, therefore, he was not able to commit such type of act. However, he neither led any evidence nor did he examine any witness in support of his defence.

2.9 On appreciation, evaluation, analysis and the close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Jamnagar has held that the victim was subjected to rape by the accused and the prosecution has established the charge leveled against the accused beyond reasonable doubt, and therefore, the accused was held guilty of the offence of rape, and therefore, he was convicted of the said offence.

2.10 Thereafter, the learned Additional Sessions Judge, Jamnagar, heard the accused and his Advocate on sentence. The learned Additional Sessions Judge has recorded that the victim was aged about six years only, therefore, the

gravity of the offence committed by the accused is more. However, looking to the circumstances that the accused has three children and a wife, he was sentenced to suffer 10 years' RI with fine of Rs.1000/- and in default simple imprisonment for a period of 2 months, which has given rise to the instant Appeal.

4. Mr.M.J.Buddhbhatti, learned advocate of the accused, contended that the defence of the accused was that of quite innocence and he has been falsely implicated. The learned trial Judge has not considered the said defence at all. The said defence is also taken by the accused in his further statement. Therefore, according to him, the learned trial Judge has committed serious error in not appreciating the evidence, which is on record, in its true perspective. According to him, no reliable, trustworthy and unimpeachable evidence has been produced by the prosecution. It is also emphasized by him that the evidence disclosed that the accused was unable to get erection of his penis and discharge semen. The judgement of the learned trial Court is based on inference and surmises. What is highlighted by him is that, there is a difference between the offence "to commit rape" and "an attempt to commit rape". According to him, if we accept the evidence of the prosecution witnesses in totality, then also, the act of the accused, at the most can be said to be "an attempt to commit

rape" and not "commit rape". In that case, the gravity of the offence would be very less, and according to him, the punishment imposed upon the accused, should be required to be reduced by holding that the accused committed the offence of "an attempt to commit rape" and not "commit rape". He, therefore, urged to allow this Appeal, and in alternative, urged to reduce the quantum of punishment imposed by the learned Additional Sessions Judge, Jamnagar.

5. Per contra, Mr. R.C.Kodekar, learned APP for the Respondent - State of Gujarat stated that there is reliable, clinching and trustworthy evidence, which, unequivocally and unerringly proves that the accused has committed rape on a six-year-old girl, and now a days, offences of sexual harassment and sexual offence of rape, more particularly upon minor girls are on increase. According to him, the testimony of the victim, her mother, panch witnesses, Medical Officer, who has examined the victim, FSL report and also the evidence of extra-judicial confession made by the accused before his superior officer, are so clinching and they corroborate each other that no doubt is left that the accused has committed rape on a six-year-old girl. The medical evidence established that there was a penetration of penis by the accused in the vagina of the victim, as a result of which the vagina of the victim was injured and hymen was ruptured. Therefore, according to

him, prosecution has established the charge leveled against the accused for commission of the offence of rape beyond reasonable doubt, and more particularly, looking to the age of the victim and also looking to the status of the accused, as he was a government servant in the Customs Department at the relevant time, no mercy can be shown by reducing the sentence imposed upon him. The Appeal, therefore, lacks merit and deserves to be dismissed. He, therefore, urged to dismiss the Appeal.

6. This Court has considered the submissions advanced by Mr. M.J.Buddhbhatti, learned advocate of the appellant and Mr. R.C.Kodekar, learned APP for the respondent - State of Gujarat at length. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections.

7. The charge against the accused is that on 19.8.1998 at about 20:30 hrs. he committed rape on a six-year-old girl in his house. He allured the victim for a chocolate and ravished her. Thereafter she was asked not to disclose the incident to her mother, otherwise she would be killed. The accused, after committing rape, dragged the victim from his house. The victim

told the aforesaid incident to her mother and therefore, she was taken to hospital, where she was treated. The complaint for the aforesaid incident was lodged at 'B' Division Police Station, Jamnager.

8. We may now advert to the oral testimony of the victim herself, who has been examined as PW-4 at exh.21. It may be noted that prior to recording her oral testimony, the learned trial Judge ascertained from her as to whether she understands the sanctity of the oath. After satisfying himself about the fact that the victim knows the sanctity of the oath, she was administered oath, and thereafter, oral testimony of the victim was recorded on oath. It may be appreciated that she has narrated the incident as per the complaint lodged by her mother. She has reiterated that she was allured for a chocolate and thereafter she went with the accused in his house and the accused committed rape upon her. It may also be appreciated that this witness of tender age of 6 years has successfully withstood the test of cross-examination, therefore, we do not propose to discuss her evidence in verbatim. We are fully satisfied that her testimony is sufficient to establish the charge leveled against the accused. As she is of tender age, she has no reason to falsely implicate the accused.

9. So far as corroborative evidence is concerned, the prosecution relied upon the evidence of PW-3

Kanchanben Bharatbhai Pankhani, mother of the victim at exh. 19. She has also narrated similar version which she has stated in her written complaint. As per the complaint exh. 52, it was initially recorded as Zero Number at 'B' Division Police Station, Jamnagar and subsequently it was transferred to Khambhalia Police Station, within whose jurisdiction, the offence took place. It may be noted that she has also successfully withstood the test of cross-examination. She denied the say of the accused that Rs.3000/- was paid by the accused to her and she again demanded Rs.7000/-, which the accused refused to pay, therefore, she has lodged the complaint.

10.Now, so far as the medical testimony is concerned, the prosecution has examined PW-1 Dr. Shobhanaben Vallabhbhai at exh. 7. She has stated that on 20.8.1998 she was on duty in Irvin Hospital, Jamnagar. At 2 0' Clock in the night, the victim was brought to her for medical examination with reference note of Chief Medical Officer, Government Dispensary. She asked the victim's mother about the history, who said that her daughter was ravished by the accused. She further stated that hymen of the victim was ruptured as there was a penetration of penis in her vagina. She has issued original indoor case papers at mark 6/23 which is at exh.8. Nothing substantial has been brought out from her evidence during the course of her cross-examination, which would help the defence or to

falsify the case of the prosecution.

11.The prosecution thereafter examined PW-2 Dr. Vinaykant Premjibhai Chavda at exh. 10. He has stated that on 19.8.1998 he was on duty as Medical Officer. The victim was brought to him by her mother. He also stated the same thing as stated by Dr. Shobhanaben Vallabhbbhai. Thereafter, he referred the victim to Irvin Hospital, Jamnagar for further treatment. It may be noted that in cross-examination, he denied the suggestion that the accused was not in a position to perform sexual intercourse.

12.In view of the aforesaid evidence, according to this Court, the sole testimony of the victim herself is sufficient to establish the charge of rape against the accused. However, her oral testimony is corroborated by the evidence of Dr. Shobhanaben Vallabhbbhai and Dr. Vinaykant Premjibhai. A perusal of the FSL report also unequivocally suggests that semen was found on the *lungi* of the accused and bloodstains were found on the *underwear* of the victim.

13.It is also the case of the prosecution that after commission of the offence, the accused gave a voluntary extra-judicial confession before Ashokbhai Gokalbhai Mackwana, with whom the accused was serving. He has been examined as PW-5 at exh. 22. In his oral testimony, he has stated that since last 12 years he was serving as Constable in Customs Department.

After the incident, the accused met him and told him that he wanted to meet his superior officers. Therefore, he inquired about the work that he had with the superior officers. At that time the accused stated that after consuming alcohol, he has committed a mistake with a small baby. It may be noted that without declaring this witness as a hostile witness, the prosecution has sought permission to put certain questions. During his cross-examination, he has unequivocally stated that the accused has admitted that he has committed rape. This witness was also subjected to lengthy cross-examination by the defence. However, nothing substantial has been brought out from him which would impeach his credibility.

14. In view of the aforesaid discussion, according to us, there is no manner of doubt that the prosecution has established the charge leveled against the accused for commission of rape on a six-year-old girl. Therefore, it is not necessary for us to discuss the evidence of other prosecutions.

15. On having close scrutiny of the evidence, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Jamnagar. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion

is possible except the one reached by the learned Additional Sessions Judge, Jamnager.

16.No new argument was advanced. No new criticism is offered. No infirmity in the reasoning of the learned Additional Sessions Judge is pointed out. The evidence has been carefully analysed and fully appreciated in the closely reasoned judgement with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

17.In aforesaid view of the matter, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

18.The manner and way in which the offence of rape was committed on a six-year-old girl, no leniency for reduction of sentence can be shown upon the accused.

19.At this stage, it would be appreciable to refer to the latest judgment of the Supreme Court in the case of State of M.P. v. Santosh Kumar, (2006) 6 SCC 1. The Supreme Court has considered the "adequate and special reasons" for awarding of sentence below the statutory minimum in the case of offence of rape. In the said case, a six-year-old child was subjected to sexual abuse by the respondent. The trial Court

found the respondent guilty of the offence punishable under Section 372(2)(f) IPC. The respondent was sentenced to undergo 10 years' RI with a fine of Rs.500/- with default stipulation. In the appeal filed before the High Court, the accused did not question the conviction, but prayed for reduction in sentence. The High Court reduced the sentence for the offence punishable under Section 376(2)(f) IPC to 5 years, while maintaining the sentence in respect of other offences. The only ground indicated by the High Court to reduce the sentence was the young age of the accused and he being a member of the Scheduled Tribe. In the said circumstances, the questions that arose before the Supreme Court were the proper sentence and acceptability of reason which weighed with the High Court for reducing the sentence.

Allowing the appeal and restoring the minimum mandatory statutory sentence imposed by the trial Court, the Supreme Court **Held:**

"Both, in cases of sub-sections (1) and (2) of Section 376 the court has the discretion to impose a sentence of imprisonment less than prescribed minimum for "adequate and special reasons". If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence, the statutory requirement

is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated.

What is applicable to the trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court in the present case is the young age of the accused and the fact that he belongs to a Scheduled Tribe. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

It is to be noted that the victim in the instant case is a child who was about 6 years of age at the time of commission of offence. Section 376(2) IPC provides for a more stringent punishment when the victim is under 12 years of age. In the instant case, the High Court was clearly in error in reducing the sentence without recording any adequate and special reason in imposing a lesser sentence."

20. Applying the principles laid down by the Supreme Court in above referred to judgment to the facts of the present case, it is seen that in the instant case also the victim is a six-year-old girl, therefore, the sentence of 10 years' RI

imposed upon the accused, does not call for any interference.

21. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Jamnager, and hence, this Appeal lacks merit, and deserves to be dismissed.

22. For the foregoing reasons, the Appeal fails and is accordingly dismissed.

(A.M.Kapapdia, J)

(K.A.Puj, J)